SOME LEGAL ASPECTS OF THE IMPEACHMENT OF WILLIAM SULZER.

WHEN the High Court of Impeachment of the State of New York found Governor Sulzer guilty and voted his removal from office on October 17th, the curtain was rung down on one of the greatest trials in our country's history, an impeachment trial which greatly exceeded in importance and interest that of Justice Chase and closely rivaled that of President Johnson. Sulzer's impeachment, like that of Chase and Johnson, was due to the animus of his political enemies; and it is most unfortunate that the Judges of the Court of Appeals who sat with the Senate should have divided so hopelessly upon the legal points involved. What these points were and how they were decided may well be a matter of considerable interest to laymen as well as to lawyers and legislators.

A brief review of these questions must necessarily include a consideration of the Articles of Impeachment. As the respondent was unanimously found not guilty of Articles III, V, VI, VII and VIII, which were not seriously pressed, only Articles I, II and IV will be considered.

Article I charged that the respondent filed a false campaign fund statement.

Article II alleged that the respondent committed perjury in swearing to the false statement.

Article IV alleged that the respondent suppressed evidence by means of threats to witnesses summoned before the legislative committee which investigated his case prior to the impeachment by the Assembly.

At the outset of the trial it was urged that the respondent was not properly impeached by the Assembly, inasmuch as the impeachment was voted at a special session of the Assembly, which under the Constitution could consider only such matters as the governor should bring specially to its attention. This objection, however, was overruled on the ground that the con-

stitutional prohibition applied only to legislative acts and that impeachment was a judicial function.

This is a most interesting and far-reaching question, and it did not receive at the hands of the Impeachment Court the careful consideration which it deserved.

Article VI, § 13, of the Constitution of the State of New York provides that "The Assembly shall have the power of impeachment by a vote of the majority of all the members elected." And Article X, § 6, provides for the assembling of the Legislature on the first Wednesday of January of each year, this being the only regular legislative session. But Article IV, § 4, provides in defining the powers and duties of the governor that:

> "He shall have power to convene the legislature, or the senate, only on extraordinary occasions. At extraordinary sessions no subject shall be acted upon, except such as the governor may recommend for consideration."

It was the contention of Governor Sulzer's counsel that the Assembly has no power of impeachment except when duly convened at a regular session, or at a special session when the governor shall recommend the impeachment of a public official. And certainly the plain meaning of the constitutional prohibition that "no subject shall be acted upon except such as the governor may recommend" would seem to preclude impeachment as well as all other legislative acts.

On the other hand, the impeachment managers contended that the Assembly has the power of impeachment whenever convened; and they even went so far as to contend that a majority of the members possess the power of impeachment, though the Assembly be not in session.

In the opinion of many of the ablest lawyers at the New York bar the decision of the court on this point has established an unfortunate precedent; for the contention that impeachment is a judicial, not a legislative, act, can hardly be sustained. It is well settled that an impeachment is the equivalent of an indictment, and a grand jury in finding an indictment performs only an administrative act. The well known decision in New York of Peo-

ple *v.* Murphy,[1] construing a judicial act as meaning the power to hear and determine controversies between adverse parties or questions in litigation, would seem to preclude impeachment, which is merely the making of an accusation, from being considered as such an act.

It may be said that the respondent's objection was technical; but the question involved is whether legislatures must proceed strictly in accordance with law and order and in conformity with the constitution, or shall be permitted to brush aside such forms as are prescribed in order to reach quickly a decision on the merits. To hold the latter is most dangerous, and would place any officer of the State at the mercy of a corrupt, or boss-ruled legislature. If the constitutional prohibition be held to cripple the power of the legislature in practically prohibiting the impeachment of a governor at a special session, the orderly remedy would seem to lie in amending the Constitution, not in overriding it, and provide, as is done in the Constitution of Mississippi, that at a special session of the legislature no subject *except impeachments* shall be considered unless recommended by the governor.

All other points of law were reserved until the completion of the taking of testimony. Barring the one raised by the motion of counsel for the managers for leave to amend Article IV so as to make it conform to the proof, which motion was denied, these points resolved themselves into the one question whether or not Governor Sulzer could be impeached for acts committed prior to his induction into office.

This question was raised in the consideration of Articles I and II, which charged the swearing to and filing of a false statement of campaign funds.

It should be borne in mind in this connection that the present Constitution of the State of New York contains no limitations of the grounds for impeachment of a public officer. The Constitutions of 1777 and 1821, however, specified certain enumerated grounds, but those specifications were eliminated in the Constitution of 1846. But thereafter in 1881 the Legislature, in enacting the Code of Criminal Procedure, declared that the court for the trial of impeachments had power to try impeachments of public

[1] 65 App. Div. 126.

officers for "wilful and corrupt misconduct in office." This was in effect a legislative declaration that the Constitution limited impeachments to such offenses, though there were no express limitations therein. The present Constitution contains the same provision as to impeachments as the Constitution of 1846.

The contention of the impeachment managers was, briefly, that, as the limitations of the grounds for impeachment had been eliminated from the Constitutions of 1846 and 1894, the Assembly was not limited to misconduct in office as a ground for impeachment; and, furthermore, that the swearing to and filing of a false campaign statement was so closely connected with Governor Sulzer's official conduct as practically to amount to misconduct in office. The purpose of an impeachment trial is to remove an officer who is found unfit mentally and morally for the duties of his office.

On the other hand, it was urged in behalf of the respondent that the legislative enactment of 1881 declared that the Constitution still limited impeachments to misconduct in office and that it would be most dangerous to hold that a public officer, whose conduct in office might be most exemplary, could be impeached for acts committed prior to his taking the oath of office and in no way related to his conduct as an officer.

On this question of far-reaching importance the Court of Appeals, proper, divided three to three and the three judges of the Supreme Court, who by designation of the governor (as provided for by statute in New York) sat as members of the Court of Appeals in the Court of Impeachment, divided two to one against the respondent. The vote of the whole Court on Articles I and II was thirty-nine to eighteen for conviction. It is generally conceded that the three judges of the Court of Appeals (Chief Judge Cullen and Judges Bartlett and Werner) who voted against conviction constituted the highest ability and greatest experience of the court; and it is unfortunate that the three judges of the Court of Appeals who voted for conviction owed their places on the bench to their election by a political party whose leader was openly charged with trying to secure a conviction of the respondent for political reasons.

The position of the judges who voted for acquittal was ex-

haustively stated by Chief Judge Cullen in the learned memorandum filed by him explaining his vote and is succinctly stated in the following quotation therefrom:

> "This brings me to what I consider the serious question in the case: Can a public officer be impeached for acts committed when he was not an officer of this State? The question is not one of power but of right. Never before the present case has it been attempted to impeach a public officer for acts committed when he was not an officer of the State.
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> "If the doctrine contended for is correct, a man guilty of any offense in his past life of sufficient gravity to justify his removal if committed when in office, may be removed from office without an opportunity to show that both his official conduct and his private life during his official term have been of the most exemplary character."

On the other hand the opinion of Judge Miller (a Supreme Court Justice sitting by designation) states the view of the convicting judges as follows:

> "The guilty consciousness evidenced by unlawful concealment of accepting money given for some ulterior purpose would equally affect his official conduct whether the money remained in his pocket, was invested in stocks in the hands of his brokers, or expended to promote his election. His violation of the corrupt practices act evidences a situation as intimately related to the discharge of his official duty, as though he had taken money for an express promise to reward the donor by some official act."

A clearer conflict of opinion is inconceivable.

On Article IV, charging an attempt to suppress evidence, the vote stood forty-three to fourteen, judges of the Court of Appeals again dividing six to three. But the only question involved was whether the charge as made was upheld by the proof.

What effect this trial will have on future impeachments throughout the nation, time alone can tell. That the verdict was unpopular can not be doubted. That, if the governor's recall had been voted upon by the electorate, he would have come out victorious is asserted by some. The writer shares the view of many that the popular dissatisfaction as to the procedure and result will be the beginning of the end, and that either the method

and procedure of impeachment will have to be greatly modified, or else the people will demand the recall or some other more popular method of removing public officials. For it should always be remembered, as is so eloquently stated in the Virginia Bill of Rights, that "When any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal."

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